



**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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Order Instituting Rulemaking to Consider the  
Adoption of a General Order and Procedures to  
Implement the Digital Infrastructure and Video  
Competition Act of 2006.

Rulemaking 06-10-005

**JOINT REPLY COMMENTS OF  
THE COUNTY OF LOS ANGELES, CALIFORNIA  
THE CITY OF LOS ANGELES, CALIFORNIA  
AND  
THE CITY OF CARLSBAD, CALIFORNIA**

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November 1, 2006

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Pursuant to Ordering Paragraph 6 of the Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006 (“OIR”), the County of Los Angeles, California, the City of Los Angeles, California, and the City of Carlsbad, California (sometimes collectively referred to herein as the “Joint Respondents”) respectfully submit the following joint reply to certain of the opening comments filed concerning the OIR and the Proposed General Order Implementing the Digital Infrastructure and Video Competition Act of 2006 (“Proposed G.O.”) attached as “Attachment B” to the OIR.

As an initial matter, the complexity of the issues raised in the various opening comments filed – and the divergent positions taken by the filers on those issues – emphatically underscore the point that the County of Los Angeles raised in its opening comments: the Commission needs to devote more time to this proceeding than the needlessly abbreviated proposed timeline set forth in the OIR allows. Joint Respondents agree with California Cable and Telecommunications Association’s (CCTA) assessment of the daunting task facing the Commission:

“The Commission must mediate conflicts and ambiguities within the Legislation itself, determine the scope of its own authority, and navigate a regulatory paradigm shift in a manner that fulfills the Legislature’s intent, minimizes costs and disruptions to stakeholders (i.e. customers, local governments, existing providers, and new entrants), and encourages a ministerial approach to franchising the promotes investment and deployment by both incumbent providers and new entrants.” CCTA Opening Comments, p. 2.

Other commenters pointed to specific areas of concern which cannot be adequately addressed in the short time frame the proposed timeline sets forth.<sup>1</sup>

The Legislature recognized the complexity of the Commission’s task when it allowed the Commission until April 1, 2007 – rather than the January 1, 2007 effective date of the bill – to complete this rulemaking, and begin accepting applications for state franchises. Pub. Util. C. § 5840(g). Accordingly, Joint Respondents join with the comments of California Community Technology Policy Group (CCTPG) and Latino Issues Forum (LIF) on this point. CCTPG/LIF Opening Comments, pp. 2-3. It is vitally important that the Commission not rush through this proceeding, but instead utilize the time the Legislature intended that the Commission take to implement this comprehensive new video franchising scheme.

# **I. THE LEGISLATION DOES NOT AUTHORIZE THE COMMISSION TO EXTEND EXPIRED OR EXPIRING LOCAL FRANCHISES.**

Joint Responders disagree with the positions asserted by CCTA supporting the Commissions’ tentative conclusion that the Commission can extend local franchises that are expired or will expire prior January 1, 2007. (CCTA Comments, pp 3-5). The underlying premise of CCTA’s comments is that AB 2987 grants the Commission authority to extend

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<sup>1</sup> For example, in stating its concerns regarding the OIR’s proposed definition of “holder,” SureWest Televideo points out that the Commission does not have an adequate record upon which to base its finding prohibiting more than one company within a family of companies to hold a state franchise. SureWest Opening Comments, p. 11. It seems highly unlikely that the Commission could develop such a record under the truncated proposed timeline.

expired or expiring local franchises through January 2, 2008, or that AB 2987 requires local entities to issue such extensions. However, as the County of Los Angeles demonstrated in its opening comments (at pp. 3-4, 6-7),<sup>2</sup> the legislation unequivocally grants local entities discretionary authority to extend franchises that have expired or will expire prior to January 2, 2008:

“When an incumbent cable operator is providing service under an expired franchise or a franchise that expires before January 2, 2008, *the local entity may* extend that franchise on the same terms and conditions through January 2, 2008.” Cal. Pub. Util. C. Section 5930(b). (emphasis added).

CCTA asserts (at p. 5) that both “the statute, and the Assembly Analysis support the Commission’s tentative conclusion” on this matter. However, CCTA does not, and cannot, point to any provision of AB 2987 which either grant the Commission authority to extend expired or expiring local franchises, or requires local entities to do so. In fact, Section 5930(b), quoted above, is the only provision in the statute that addresses this issue. In tacit acknowledgement of this fact, CCTA falls back to comments in the Assembly Floor Analysis to support its position. CCTA Opening Comments, p. 5. These comments cannot support an unlawful expansion of the Commission’s authority under the legislation, however, and certainly cannot support a Commission rule which directly conflicts with the legislation. *See, e.g. Bearden v. U.S. Borax, Inc.*, 138 Cal.App.4th 429, 435-436 (2006).

Joint Respondents further disagree with CCTA’s attempt to convince the Commission that contravening the language of the statute is necessary, to prevent dire consequences for cable operators. CCTA asserts that cable operators that are currently operating under the terms of franchises which have already expired are “already facing the possibility that after January 1,

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<sup>2</sup> See Opening Comments of: League of California Cities and States of California and Nevada , pp. 12-13; City of Arcadia, pp. 4-6; City of Redondo Beach, pp. 4-6.

2007, local entities will treat them as if they were unauthorized to provide service unless the cable operator agrees to negotiate a new franchise in the interim.” CCTA Opening Comments, p.

4. It is not at all clear, however, why CCTA believes January 1, 2007 will trigger such action by local entities. The scope of a cable operator’s authority to provide service under an expired franchise is a question of both contract law and federal law.<sup>3</sup> Whether the operator is authorized, or is not authorized, nothing that occurs on January 1, 2007 changes its status.<sup>4</sup>

It is also not at all clear why Commission action would be either necessary or warranted. An operator who finds itself in that situation has several options – none of which necessitate unlawful expansion of the Commission’s authority under AB 2987. For example, the operator can approach the local entity now to work out an extension of the franchise by mutual agreement – and in fact, at least some local entities and cable operators are moving forward with such extensions. The cable operator can also move forward toward completion of the renewal process it (almost certainly) triggered under 47 U.S.C. Section 546(a). Indeed, the Legislature certainly did not intend that a cable operator that is in renewal proceedings with a local entity – whether under the formal renewal process (pursuant to 47 U.S.C. Section 546(a)-(g)) or informal renewal negotiations (pursuant to 47 U.S.C. Section 546(h)) – be given the option to turn to the

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<sup>3</sup> Cable operators have long maintained that where such an operator has timely reserved its federal renewal rights under 47 U.S.C. Section 546, it is authorized to continue providing service until such time as the renewal process has been finally completed. *See, e.g. Comcast v. Walnut Creek*, 371 F.Supp.2d 1147 (N.D. Cal., 2005).

<sup>4</sup> In the City of Los Angeles, Time Warner operates systems in twelve City franchise areas, under the terms and conditions of franchises that are currently expired and are not currently extended. At various times since June 2002, the franchisees in these City franchise areas have operated under non-extended expired franchise. The City has not taken any threatening action against the franchisees concerning their authorization to continue to operate under the terms of the expired franchises beyond January 1, 2007.

Commission on January 1, 2007 for an automatic franchise extension which obviates those proceedings. The OIR is not consistent with the Legislation on this point.

Joint Respondents' do not take issue with the Assembly Analysis comments cited by CCTA (at p. 5 of its Opening Comments) that state:

“while the transition period leaves local franchises in place for a period of time, the transition period should not allow local governments to diminish the rights an incumbent cable operator has to occupy the public rights-of-way, any protections or rights provided under federal law, or to frustrate the Legislature’s intention in enacting this division.”

However, the Commission must not – as CCTA urges – establish rules that *expand* the rights an incumbent cable operator has to occupy the rights-of-way or any protections or rights provided under federal law; nor should the Commission establish rules that diminish the protections or rights afforded to local government under federal law during the transition period. There is nothing in the Legislation which grants the Commission authority to interfere with existing renewal proceedings by extending expired local franchises. Whatever rights an incumbent cable operator operating under an expired franchise has under federal law before January 1, 2007 are the same rights it has after January 1, 2007, until such time as it can obtain a state franchise on January 2, 2008 under the legislation.

## **II. THE COMMISSION SHOULD RETAIN ITS PROHIBITION AGAINST MULTIPLE ENTITIES OF THE SAME COMPANY HOLDING STATE FRANCHISES**

Joint Responders acknowledge the arguments of some telephone and cable industry commenters concerning the practicality of the OIR’s tentative conclusion that only an applicant’s parent company may hold the state franchise. However, the experience of both the County of Los Angeles and the City of Los Angeles in dealing with multiple cable operators, holding

multiple local franchises, under multiple affiliates, and the experience of the City of Carlsbad in dealing with the impact of undisclosed internal changes in the affiliate which holds the franchise, prompts Joint Responders to urge the Commission to maintain a rule which implements the Legislative intent that the Commission may “prohibit the holding of multiple franchises through separate subsidiaries or affiliates.” Cal. Pub. Util. C. Section 5040(f).

The Commission’s concerns regarding the potential for evasion of statutory obligations, through the holding of multiple state franchises via multiple entities, are well founded. In the experience of both the County of Los Angeles and the City of Los Angeles, cable operators often change the entity within the corporate family that actually holds the franchise, sometimes with no notice to the franchising authority, even though the codes and/or franchises in both the County of Los Angeles and the City of Los Angeles require such notice. Although often such change may not have not triggered the County’s review and approval, under the transfer provisions of the franchise and the County Code, the County often would not find out about such a transaction until well after the fact – and usually as a result of an unrelated action such as the filing of a transfer application which names a different entity as the current franchise holder than was previously disclosed to the County of Los Angeles or the City of Los Angeles.

In the City of Carlsbad, the undisclosed transfer of the franchise from the owners which the City of Carlsbad approved as the franchise holder to an affiliated entity was not discovered until after the parent owners filed for bankruptcy protection and were forced into a Department of Justice forfeiture proceeding.

Under the local franchising scheme, Joint Respondents retained their franchise enforcement mechanisms regardless of which entity held the franchise, thus, such actions, while problematic, did not necessarily impact Joint Respondents’ ability to enforce franchise

provisions. However, under the state franchising scheme, a local entity's only mechanism for enforcing many of the provisions of the legislation is litigation. These limitations on local entities' enforcement authority make it vital that local entities have some certainty as to what entity holds the state franchise. In this regard, Joint Responders agree with the telephone and cable industry commenters concerning the impracticability of a rule requiring that the parent company hold the state franchise. Since almost none these parent corporations are California corporations, any lawsuit brought in a state court by a local entity against a parent corporation to enforce the provisions of the statute – even a dispute regarding a franchise fee underpayment – would almost certainly be removed by the parent corporation to federal court, on diversity jurisdiction grounds. Thus, as a practical matter, interpretation and enforcement of the California state franchising provisions would, effectively, be the exclusive province of the federal courts.

Joint Responders disagree, however, with suggestions by CCTA, Verizon, and AT&T that companies should be able to hold state franchises through multiple entities. Further, Joint Responders strongly disagree with assertions by the various telephone and cable industry commenters that the Commission should sit back and wait until problems arise, before implanting regulations prohibiting the holding of multiple state franchises by multiple affiliates of the same company.<sup>5</sup> SureWest's suggestion that the OIR be revised to require that only one company – which does not have to be the ultimate parent entity – within a family of companies may hold a state franchise – appears, on initial analysis, to be a better solution. However, Joint Responders urge that the Commission modify its proposed rule even further, by requiring that the one company which may hold the state franchise be a California company. Such a rule is

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<sup>5</sup> SureWest Opening Comments, p. 12; Verizon Opening Comments, p. 18, CCTA Opening Comments, p. 8.

necessary to avoid the routine removal by state franchise holders of enforcement actions to federal court, no matter how small the dispute is.

**III. THE COMMISSION'S RULES SHOULD CLARIFY THAT ANY BOND REQUIREMENTS IN THE GENERAL ORDER DO NOT RESTRICT A LOCAL GOVERNMENT'S AUTHORITY TO REQUIRE SECURITY INSTRUMENTS FOR CONSTRUCTION IN THE RIGHTS-OF-WAY.**

Joint Responders agree with, and join in, comments by the League of California Cities/SCAN NATOA and others concerning the amount of the bond the Commission can require of applicants for state franchises.<sup>6</sup> The flat \$100,000 bond amount, which may be adequate in the case of a state franchise which is operating only in limited areas, appears to be woefully inadequate to secure the performance of a state franchisee which may be operating statewide.

For example, the City of Los Angeles currently requires incumbent cable providers to provide a performance bond or a letter of credit in each of the City's fourteen franchise area, ranging from \$82,000 to \$1 million dollars, depending on the geographical size of the franchise area, the size of the system to be installed in the City's public-rights-of way, the number of homes passed, and the number of potential subscribers in each of the franchise areas, and other risk factors. The bonds required of state franchise holders by the Commission should also be proportional, based on similar factors.

Joint Responders also urge the Commission to clarify that its bond requirement is not a substitute for a state franchise holder providing any security instrument that may be required by a local entity for persons obtaining permits to do construction in the rights-of-way.

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<sup>6</sup> See, League of California Cities/SCAN NATOA Opening Comments, pp. 3-4; City of Arcadia Opening Comments, pp. 6-9; City of Redondo Beach Opening Comments, pp. 6-9; City of Pasadena Opening Comments, p. 3.

## **CONCLUSION**

Joint Responders urge the Commission to consider extending its timeline to allow for full analysis and participation by all interested stakeholders in this process prior to the issuance of a comprehensive General Order. The April 1, 2007 deadline for the Commission to begin accepting applications allows the Commission three additional months for this process which the Commission's proposed timeline does not take into account.

The Commission's tentative conclusion that it has the authority to extend franchises that have expired or will expire prior to January 2, 2008 is not consistent with the language of the statute. The Commission should decline the invitation to insert itself into ongoing renewal proceedings by granting incumbent cable operators operating under expired or expiring franchises expanded rights beyond what they are now entitled to under federal law, and by impairing the rights and protections federal law provides to local entities who are involved in the renewal process.

The Commission should clarify that any requirement for applications for state franchises to post bonds does not impact the ability of local entities to require security instruments for construction in the public rights-of-way. Further, the Commission should amend its proposed rules to establish a rational relationship between the amount of the bond and the size of the state franchise area an operator is serving.

Finally, the Commission should modify its proposed General Order to require that only one company within a family of companies may hold a state franchise, and to require that the

company that holds the state franchise be a California company, in order to avoid routine removal of state enforcement actions brought by local entities to federal court.

Respectfully submitted,

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November 1, 2006

# CERTIFICATE OF SERVICE

I certify that I have served a true copy of the original attached JOINT REPLY COMMENTS OF THE COUNTY OF LOS ANGELES, CALIFORNIA AND THE CITY OF CARLSBAD, CALIFORNIA by transmitting an electronic copy to each party named in the official service list as maintained on the California Public Utilities Commission's web page on all known parties of record in this proceeding or their attorneys of record.

Dated: November 1, 2006 at Washington, DC

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/S/

Willette A. Hill

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**Service Lists**

**Proceeding: R0610005 - CPUC - CABLE TELEVIS**

**Filer: CPUC - CABLE TELEVISION**

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**Last changed: October 31, 2006**

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